Date: 20230911

File: 566-02-46907

Citation: 2023 FPSLREB 82

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JASON STEELE

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Steele v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: Lisa Lawlor, senior Corporate Labour Relations Advisor

Decided on the basis of written submissions,
filed March 28, April 12 and 27, and June 15, 22, and 27, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Jason Steele ("the grievor") works as a correctional manager at the Correctional Service of Canada's ("the respondent") Joyceville Institution in Kingston, Ontario, where he supervises correctional officers. He filed a grievance on June 10, 2022, after the respondent gave him a written letter of reprimand for his refusal to comply with, as it stated, "an order from a superior".

[2] The essence of the grievance is as follows, as taken from the grievance form:

> *I Jason Steele, grieve that on May 30, 2022 I received discipline without due process. The employer did violate and willingly chose not to adhere to the policy and procedures set out by CSC regarding the disciplinary process. The employer willingly did not follow CSC policy and procedure in relation to the discipline process as well as the guidelines laid out in A Manager's Guide to Disciplinary Investigations … Furthermore, this disciplinary action is excessive, unwarranted and unfounded.*
>
> *This constitutes an abuse of the employer's power and managerial rights.*
>
> …
>
> [Corrective action sought]
>
> *To be made whole, all references to this disciplinary action to be removed from all files.*
>
> *That I be reimbursed with legal interest.*
>
> *That the discipline be purged from my files.*
>
> *And all other rights under the collective agreement and any applicable law*
>
> *Any other remedy to be presented or that the Board may deem fit.*
>
> *A written apology.*
>
> *That the employer ceases its unreasonable exercise of power and follows fair due process in disciplinary investigations and hearings.*

[3] CX-04s are unrepresented by a bargaining agent. A memorandum of understanding is in place between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN that excludes all positions classified CX-04 for the duration of the collective agreement between them, which expired on May 31, 2022 ("the collective agreement").

[4] On May 30, 2022, the grievor received a letter of reprimand for refusing to comply with an order from an assistant warden.

[5] The grievance was heard at the first and second levels and was referred to adjudication on March 9, 2023, after the respondent did not issue a final-level response.

[6] The grievor filled out a Form 21 and indicated that the grievance was being referred under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). This provision refers to a disciplinary action resulting in a termination, demotion, suspension, or financial penalty.

[7] On March 28, 2023, the respondent raised a preliminary objection to the Federal Public Sector Labour Relations and Employment Board's ("the Board") jurisdiction. The respondent argued that the grievance is about a written reprimand and that there is "ample jurisprudence" to support its position that a written reprimand is not "… *a disciplinary action resulting in …* ***demotion, suspension or financial penalty***" [emphasis in the original]. The respondent requested that the objection be upheld and that the file be closed.

[8] The grievor replied on April 12, 2023, stating that the grievance was not just about the written reprimand but also about the respondent's disciplinary and grievance processes that he alleged were disregarded. He stated that the respondent failed to issue a third-level response, in spite of an extension being granted. Furthermore, he argued that those involved in administering the discipline took part in the grievance process. He submitted that the written reprimand affected his ability to apply for promotions and to earn income, to support his family.

[9] This decision deals only with the preliminary objection. On May 24, 2023, the Board's Registry wrote to the parties to advise that after reviewing the file, the Board Member determined that the preliminary objection could be decided on the basis of written submissions. The Board provided the parties with an opportunity to provide supplementary submissions and a schedule for them. The respondent filed supplementary written submissions on June 15, 2023, and the grievor filed his response on June 22, 2023. The respondent provided a rebuttal on June 27, 2023.

[10] After a complete review of the file, including all the written submissions, I must uphold the preliminary objection. The parties both state in their submissions that this grievance is about a written reprimand and the disciplinary process that preceded it. The Board is without jurisdiction to hear a matter that is referred to adjudication under s. 209(1)(b) and that is not discipline **resulting in** a termination, demotion, suspension, or financial penalty. The grievor failed to establish that the written reprimand resulted in a financial penalty.

A. Procedural history

[11] The parties did not submit a joint book of documents. However, the facts that follow are not in dispute.

[12] On April 20, 2022, the grievor refused to follow an order by an assistant warden as to where inmate visits with legal counsel should take place.

[13] No disciplinary investigation took place about the incident.

[14] The grievor was hand-delivered a notice of a disciplinary hearing for the incident on May 3, 2022. The notice advised that the disciplinary hearing would be held on May 10, 2022, at 10:00 a.m.

[15] After the disciplinary hearing, the grievor received a letter of reprimand on May 30, 2022.

[16] The grievor filed a grievance contesting the letter of reprimand and the disciplinary process on June 10, 2022.

[17] The respondent issued first- and second-level grievance responses on June 24 and July 12, 2022, respectively, signed by the acting deputy warden and the warden. The grievance was referred to the final level on July 19, 2022.

[18] The respondent did not issue a final-level response.

[19] The grievor referred the matter to adjudication on March 9, 2023.

II. The issue

[20] Does the Board have jurisdiction to hear a grievance about a written reprimand and the disciplinary process that resulted in it?

III. Summary of the arguments

A. For the respondent

[21] The respondent argues that it issued a written reprimand to the grievor on May 30, 2022. It did not impose a disciplinary action resulting in a termination, demotion, suspension, or financial penalty. Therefore, the Board has no jurisdiction to hear this matter since a written reprimand is not included in the language of s. 209(1)(b) of the *Act*.

[22] The respondent submits that this issue is well supported in the case law. It relies on the following cases: *Reasner v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26260 (19950607); *Lamarre v. Treasury Board (Fisheries and Oceans)*, PSSRB File No. 166-02-26902 (19960311); *Rajakaruna v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-23135 (19930414); *Attorney General of Canada v. Lachapelle*, [1979] 1 F.C. 377 (T.D.); *Parkolub v. Canada Revenue Agency*, 2007 PSLRB 64; *Wepruk v. Treasury Board (Department of Health)*, 2016 PSLREB 55; *Gardanis v. Deputy Head (Department of Employment and Social Development)*, 2022 FPSLREB 5; and *MacDonald v. Deputy Head (Department of Public Works and Government Services)*, 2022 FPSLREB 8.

[23] Furthermore, the respondent argues that the grievor's allegations about the disciplinary process, including procedural fairness issues, are secondary but that they stem from the disciplinary sanction. Issues involving procedural fairness and natural justice are often found in sections of collective agreements related to standards of discipline. However, in this case, the grievor is not represented by a bargaining agent, and no collective agreement provisions apply.

[24] An adjudicator cannot use the "process issue" or issues of fairness or due process to expand its jurisdiction when Parliament did not intend written or oral reprimands to be adjudicable (see *Lachapelle*).

[25] While an individual grievance can be referred to adjudication under s. 209(1)(a) of the *Act* if it has not been dealt with to the employee's satisfaction and if the grievance relates to the interpretation or application of a collective agreement, the grievor is an excluded manager, and that provision applies only to employees represented by a bargaining agent. It is irrelevant that some of the terms and

conditions of the collective agreement apply to the grievor as s. 209(1)(a) does not apply to him.

[26] The respondent also cited *Parkolub* and *Symes v. Deputy Head (Department of Citizenship and Immigration)*, 2011 PSLRB 39. *Parkolub* applies the former *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; "the former *Act*") but stands for the proposition that general collective agreement language cannot expand the Board's jurisdiction. Thus, a grievance alleging a breach of due process is still a disciplinary grievance and is not about interpreting a collective agreement. Given the grievor's CX-04 position, he is precluded from referring a grievance to adjudication that refers to applying a collective agreement's terms and conditions.

[27] *Symes* affirms that an unrepresented grievor has only one avenue through which to refer a grievance — s. 209(1)(b). A written reprimand does not fit the criteria of this provision.

[28] Whether the grievance was referred under ss. 209(1)(a) or (b), the Board has no jurisdiction to decide it.

[29] The respondent provided arguments on the merits of the grievance, none of which I will address in this decision since this decision deals only with its preliminary objection.

B. For the grievor

[30] In response to the preliminary objection, the grievor pleads with the Board to hear this grievance at adjudication as it "… not only refers to a written reprimand but the employer's disregard for following their own disciplinary and grievance procedures".

[31] The grievor alleged that the manager who administered the discipline participated in the disciplinary process. The grievor also submitted that the respondent did not issue a final-level response, which is unfair. He alleges that the written reprimand has affected his ability to apply for promotions.

[32] In response to the respondent's preliminary objection, the grievor added on April 12, 2023, the following about the written reprimand on his record: "… [it] directly effect [*sic*] my potential to earn and provide for my family."

[33] Contrary to the respondent's allegations, he suffered a financial penalty under s. 209(1)(b) as his ability to secure a promotion has been hindered.

[34] After 26 years with the federal public service, he will not be considered for, screened in to, or recommended for acting positions for a two-year period because the letter of reprimand is on his file.

[35] The grievor stated that his post-retirement income is also affected as he is in the latter years of his career. Being unable to apply for a promotion will affect his pensionable income and will provide him with less income when he retires.

C. For the respondent — rebuttal

[36] In its rebuttal submissions of June 27, 2023, the respondent submitted that the term financial penalty in section 209(1)(b) of the *Act* refers to a singular financial penalty resulting from an issued disciplinary sanction. The respondent claimed that the grievor provided no evidence that he has been denied career advancement due to this sanction. Further, the grievor is barred under *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), from raising this new allegation which was not in his initial grievance.

[37] The respondent also noted that the grievor was barred under *Burchill* from raising new allegations about managers allegedly involved in the grievance and disciplinary process.

[38] Finally, the respondent argued that section 209(1)(a) of the *Act* did not apply to the grievor since he is in an excluded managerial CX-04 position. He is not represented by any bargaining agent. Section 209(1)(a) only applies to union members who have the support of their bargaining agent.

IV. Reasons

[39] Both parties provided submissions on the merits. However, since this decision deals only with the preliminary objection, I will not address those submissions even though I have thoroughly reviewed all the materials submitted.

[40] This means that the allegations from both parties about the incident of April 20, 2022, and the nature of the disciplinary process that followed will not be addressed on

the merits. My analysis will focus on determining whether the written reprimand and the related disciplinary process are adjudicable under s. 209(1)(b) of the *Act*.

[41] For the reasons that follow, I must conclude that the Board is without jurisdiction to hear this grievance.

A. The relevant provisions of the *Act*

[42] I reproduce as follows the portions of the *Act* that were applicable at the relevant time:

…	[…]
209 (1) *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*	***209 (1)*** *Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un* membre, *au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada, *peut renvoyer à l'arbitrage tout grief individuel portant sur :*
(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*	***a)*** *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*
(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty ….*	***b)*** *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;*
…	[…]

[43] Section 209(1)(b) is specific. Its language greatly limits the kinds of disciplinary actions that can be referred to adjudication.

[44] This is not to say that an unrepresented employee has no recourse when a respondent issues a written reprimand. The employee may present their grievance at different levels of the grievance process to seek resolution, but once the final level has been exhausted, there is no recourse to adjudication before the Board.

[45] Parliament's intent was not to allow all disciplinary actions to be referred to adjudication — but only those with severe and specific results, notably, terminations, demotions, suspensions, or financial penalties. The Board has overwhelmingly determined that this statutory language at s. 209(1)(b) bars it from adjudicating written reprimands, as reviewed below.

B. A written reprimand that does not result in a financial penalty is not adjudicable

[46] In *Canada (Attorney General) v. Robitaille*, 2011 FC 1218 (followed in *Gardanis*), the Federal Court concluded that it was unreasonable for the Board to hear a grievance referred under s. 209(1)(b) that challenged a written reprimand. I cite as follows the relevant paragraphs, which cite *Lachapelle* and *Lamarre*. The respondent also refers to those cases in its submissions:

> …
>
> *[25] Section 208 of the PSLRA allows an employee who feels aggrieved to present a grievance against any matter affecting his or her conditions of employment.*
>
> *[26] I agree with the applicant that any grievance presented pursuant to section 208 of the PSLRA is not necessarily arbitrable. Parliament specified at section 209 of the PSLRA that only grievances related to the matters in paragraphs 209(1)*(a)*, (*b*), (*c*) and (*d*) may be referred to adjudication.*
>
> *[27] More specifically, regarding disciplinary actions, Parliament decided that only grievances disputing the most severe disciplinary actions may be referred to adjudication. Under paragraph 209(1)*(b*) of the PSLRA, only a grievance against a disciplinary action resulting in termination, demotion, suspension or financial penalty may be referred to adjudication.*
>
> *[28] A written reprimand, though a disciplinary action, does not result in the consequences listed in paragraph 209(1)*(b*) of the PSLRA and, consequently, a grievance related to a written reprimand cannot be referred to adjudication. The Federal Court confirmed this interpretation in* Canada (Attorney General) v. Lachapelle, *[1978] F. C. J. No 145, at paragraph 11:*
>
> > . . . In enacting this provision Parliament clearly intended to limit and define the cases in which an employee, whether or not he was a member of a union, would be entitled to submit his grievance to this method of adjudication which it was establishing and entrusting to the supervision of the Board that it had just created. It is clear that Parliament did not intend all grievances to require the intervention of an official adjudicator in addition to the levels of the ordinary procedure. . . . By expressing itself as it did, Parliament appears to me to have intended to begin with an overall

> consideration of all grievances involving disciplinary action against individuals and then to eliminate all but those dealing with disciplinary action entailing discharge, suspension or a financial penalty. . . . .
>
> *[29] This interpretation was also adopted by the PSLRB in* Lamarre v. Treasury Board (Fisheries and Oceans)*, [1996] C.P.S.S.R.B. No 20:*
>
> [7] Section 92 specifically limits the kind of grievances that may be referred to adjudication. Only disciplinary action that has resulted in a short time, in suspension, a financial penalty, termination of employment or demotion may be referred to adjudication.
>
> [8] The letter of reprimand does not constitute a penalty giving entitlement to a reference to adjudication, although it does indeed constitute disciplinary action which, in the context of a system of progressive discipline, could one day justify the imposition of harsher penalties.
>
> …

[47] Since the *Robitaille* decision, the title of the *Public Service Labour Relations Act* was changed to the *Federal Public Sector Labour Relations Act*, but the language of s. 209(1)(b), which is at issue in this decision, has not changed.

[48] Furthermore, the respondent cites decisions such as *Reasner*, *Lamarre*, and *Rajakaruna*, which were rendered by the former Public Service Staff Relations Board (PSSRB) under the former *Act*, and its s. 92 was nearly identical to s. 209(1)(b) of the *Act*. The same principle applied in those decisions. The PSSRB found that it was without jurisdiction to hear grievances about written reprimands, given the restrictive language of the provision.

[49] It is undisputed that the grievor was disciplined, but what he received on May 30, 2022, was a written reprimand, nothing else.

[50] *Massip v. Canada (Treasury Board)*, [1985] F.C.J. No. 12 (F.C.A.) (cited at para. 109 of *Parkolub*) is the leading case that considers what may constitute a disciplinary action resulting in a financial penalty. In making a determination, the Board needs to examine whether the loss is "… 'too remote' or one that arises immediately and inevitably from the disciplinary action …" (see *Parkolub* at para. 109).

[51] There is nothing in the allegations on the grievance form or in any of the correspondence about the grievance process that references a financial penalty, such

as the loss of income. In his grievance form, the grievor's main target is the allegedly unfair disciplinary process. There is no mention of financial loss. Therefore, I find that the written reprimand did not result in any financial penalty.

[52] The grievor also made several allegations in his initial grievance about the disciplinary process that led to the written reprimand, notably the following allegations in his grievance:

- the respondent did not follow its disciplinary and grievance processes;
- the disciplinary process was unfair;
- the disciplinary process did not provide him with an opportunity to be fully heard or to hear the case or evidence against him; and
- the disciplinary process was biased

[53] The grievor's allegations about the disciplinary process are all related to the respondent-driven process that preceded the respondent's letter of reprimand on May 30, 2022. That process cannot be divorced from its final result, which was the written reprimand.

[54] Therefore, in the absence of jurisdiction over the written reprimand, the Board has no jurisdiction over procedural fairness and natural justice allegations made about the disciplinary process. This is similar to *MacDonald*, at para. 62, where the Board determined that allegations about the discriminatory nature of a written reprimand were not adjudicable as standalone issues in the absence of jurisdiction over the written reprimand.

C. No jurisdiction under s. 209(1)(a)

[55] Further, the grievor cannot refer the grievance under s. 209(1)(a) since he is not represented by any bargaining agent (see *Parkolub* and *Symes*). Section 209(1)(a) allows for the referral of grievances related to the interpretation, application and administration of the collective agreement. These grievances require the approval of a bargaining agent.

[56] It is undisputed that the grievor is a CX-04 and unrepresented. Therefore, s. 209(1)(a) does not apply to him.

D. The objections under *Burchill*

[57] I will now address the respondent's objections under *Burchill* about certain new allegations that the grievor raised for the first time in his reply to the preliminary objection. The respondent argues that the grievor is barred from making these two allegations:

> 1) the process was unfair because the same manager who administered the discipline also participated in the grievance process; and
> 2) the disciplinary sanction had the effect of denying the grievor career advancement opportunities.

[58] *Burchill* is essentially a rule about fairness and the right of a party to know the case against them and to be shielded from surprises during the grievance process. A grievor cannot change the basis of their grievance during the grievance process and is therefore barred from referring a grievance to adjudication with new allegations that were never raised before.

[59] Since I have already determined that the Board has no jurisdiction to address any allegations about due process, procedural fairness or the lack of it, it would be a moot point to address whether the grievor is barred under *Burchill* from raising this allegation. A determination would have no impact on the outcome of this decision so I will make none.

[60] With respect to the grievor's allegation that the discipline resulted in the denial of career advancement opportunities, I find that this allegation was raised for the first time in the grievor's response to the respondent's preliminary objection. It does not appear anywhere on the initial grievance form or at any stage of the grievance process before the grievance was referred to adjudication. The respondent only raised the *Burchill* objection regarding this allegation in its final rebuttal and the grievor had no opportunity to respond to it. Since I have already found that the grievor has not met his burden of establishing a financial penalty, there is no need to make a determination regarding this second *Burchill* objection as it would have no impact on the outcome of this matter.

[61] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[62] The preliminary objection is upheld. The Board is without jurisdiction to hear the grievance.

[63] The grievance is denied.

September 11, 2023.

Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board